No. 12245

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILTON THEODORE SHAFER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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TABLE OF AUTHORITIES CITED

Cases

Statutes

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To the Honorable United States Court of Appeals for the Ninth Circuit:

Petition of the defendant Appellant for a rehearing of the Appeal herein is based on the following grounds:

1. Misapplication of the principles of *Hagner v. United States,* 285 U. S. 427, 433, and *Kalos v. United States,* 9 F. 2d 268 at 270. A consideration of these cases would indicate that knowledge by the defendant when he is alleged to have received the narcotic described in Section 174 of United States Code, Title 21, is an essential element of the crime made so by that section and this Court is at variance with that opinion in holding that the words "fraudulently or knowingly" are not connected with the crime of receiving, facilitating and concealing of the narcotic described in the statute, Section 174.

2. The decision is not clear how the statute divided itself into a second clause to which the words "fraudulently or knowingly" are not connected.

POINT I.

The elements of the crimes created by Section 174 are:

1. The crime of fraudulently or knowingly importing or bringing any narcotic drug into the United States contrary to law.

2. The crime of assisting another person in fraudulently or knowingly importing or bringing any narcotic drug into the United States contrary to law.

3. The crime of fraudulently or knowingly receiving or concealing or buying or selling or in any manner facilitating the transportation, concealment or sale of any *such* (italics ours) narcotic drug after being imported or brought in, *knowing the same* (italics ours) to have been imported contrary to law. The italicized words *"the same"* and *"such"* refer back to the same narcotic drug specifically described and classified in the first part of the sentence of Section 174, to-wit: "fraudulently or knowingly imports or brings any narcotic drug into the United States." Those words refer not to just any narcotic drug imported contrary to law but they refer specifically to any narcotic drug which was fraudulently and knowingly brought in contrary to law. Such words make the first portion of the first sentence of Section 174 a part of the elements of the crimes which relate to receiving or concealing or facilitating; by such reference Congress, in creating crimes which relate to receiving, concealing or facilitating, made the necessary elements as follows:

A. A narcotic drug which had fraudulently or knowingly been imported into the United States contrary to law, B. and knowingly received such narcotic drug which

has been fraudulently and knowingly imported into the United States contrary to law, C. knowing that such fraudulently or knowingly imported narcotic drug had been imported contrary to law; had Congress intended that the mere receipt of any narcotic drug which had been imported contrary to law would be the only elements of crime created by it, it would have said receiving any narcotic drug and not any *such* narcotic drug. The scienter is not limited to knowing that a narcotic drug was imported contrary to law; the scienter is the knowledge by the defendant when he receives a narcotic drug as in *Kalos v. United States,* 9 F. 2d 268 at 270, which holds at page 270 in Note 3, "On the other point, that defendant knew when the package was handed to him it concealed morphine which had been unlawfully imported, we feel the prosecution failed to make a case for the jury. Knowledge by defendant that morphine was in the package is an element of the crime, made so by statute," and knowing that it was a narcotic drug which had been fraudulently or knowingly imported contrary to law.

The cited case, *United States v. Amaroso,* in the opinion of the Honorable Court does not have before it the problem as presented in the instant case. And even if the cited case is authority for the rule that under an indictment the Court would be required to charge not only that the exact knowledge specified in the statute must be found, but also to charge that a definite criminal intent existed before conviction could ensue. The element of the exact knowledge specified in the statute as set forth in the rule is not disposed of by the cited cases in their opinion nor by this Honorable Court's opinion.

POINT II.

The grammatical construction urged in the opinion would indicate that adverbs do not modify all the verbs that follow them in *seriatim*. Such construction would of necessity require a repetition of the adverb to modify every verb which follows it to effectively modify each of such verbs. The ordinary drafting of statutes, informations and indictments never require such a repetition and it has been customarily accepted as a matter of grammatical construction that the one adverb preceding a series of verbs modify each of such verbs.

The decision creates a doubt as to whether the Court finds that the indictment states a sufficient crime because a jury would have to be charged with the exact knowledge specified in the statute and that a definite criminal intent existed; and that from a guilty verdict by the jury a fatally defective indictment would be cured. The decision, in the light of the foregoing, is not clear how the defendant could be in no doubt as to the crime charged in the Count.

Respectfully submitted,

MAX TENDLER,
Attorney for Defendant and Appellant.

The foregoing Petition is believed to be well founded in the points of law and has not been filed for the purpose of delay.

MAX TENDLER,

Attorney for Defendant and Appellant.